ICO call for views on a data protection and journalism code of practice

Response of the Media Lawyers Association

This response to the ICO's Call for Views is submitted on behalf of the Media Lawyers Association (the 'MLA'), an association of in-house media lawyers from many of the UK's leading newspapers, broadcasters, book publishers, magazines, and representative bodies (such as the News Media Association, which is the voice of national, regional and local news media organisations across the UK) who publish information in the UK, EU and worldwide. The MLA's purpose is to promote and protect the fundamental right to freedom of expression and the right of everyone to impart and receive information, ideas and opinions.

The MLA understands that this "Call for Views" is the initial stage in the consultation process on the new code and anticipates, therefore, that the ICO will be consulting formally on its proposed terms, once a draft has been prepared which takes account of views received at this stage. The MLA's expectation is that it will be treated as a participant in that further process of consultation.

The MLA and its members contributed to the debate and consultation that resulted in the 2014 ICO Guide "Data Protection and Journalism". This consultation process consisted of both written submissions and constructive dialogue with the then Commissioner, Christopher Graham. We hope that a similar consultation process will be followed again for the forthcoming guidance. We hope to make a positive and constructive contribution so the forthcoming guide reflects both good practice and the practical application of data protection law to journalism.

The organisations that the MLA represents have significant practical experience of seeking to comply with data protection laws, as well as related areas such as privacy law. We hope we can usefully contribute to help create what is required under s124 of the 2018 Act, that is, a code that must contain *"practical guidance"* that will *"promote good practice in the processing of personal data for the purposes of journalism"* having consulted with relevant trade associations.

Protecting the public's right to information

Article 85 GDPR requires that data protection rights are reconciled with "the right to freedom of expression and information", which is a fundamental right protected by Article 11 of the European Charter of Fundamental Rights of the European Union and Article 10 of the European Convention on Human Rights. In reviewing and revising the existing guidance, it is therefore imperative that the right of the public to receive information, and the right and duty of the media to create and disseminate such information, are explicitly recognised in and sit at the core of the guidance.

To ensure that these rights are properly protected, the code needs to accurately reflect the laws and incorporate the wide-ranging statutory and common law exemptions to protect the public's legal right to receive information and the media's legal right to impart information.

In balancing the right to freedom of expression and information with the data protection rights of individuals, it must be reflected that the former forms an inherent part of the UK's cultural and artistic heritage and the creation and dissemination of journalism, art or literature has been recognised for *"enriching society in the UK and promoting the UK abroad"* Sunday Times v UK (No. 2) (1992) 14 EHRR 229, [50]. This must be reflected by the ICO both when applying the data protection legislation and when formulating regulatory policy in this field.

Data protection rights do not automatically trump those of freedom of expression and information and a balancing exercise, having regard to the specific facts of any given case, will have to be carried out. The European Court of Human Rights has recognised that any restriction upon the right to freedom of expression must be *"convincingly established and narrowly interpreted" (Satukunnan Markkinapörssi Oy and Satamedia Oy v Finland, 931/13)*. This is especially important since not all personal data and its processing will attract the protection of Article 8 of the Convention.

In drafting the new code, the strong recognition in law of the special role of the right to receive and impart information must be at the forefront, reflecting that these are fundamental rights and according with the exemptions protecting the special nature of the public's right to information and the protection of journalistic material. Any code should not place new restrictions on the media unless there is clear legislative power to do so and should reflect that many of the changes in the 2018 Act and in recent jurisprudence are highly favourable to the media, placing the media in a stronger position than under the 1998 Act.

We agree with the principles-based approach adopted in the existing guidance. The data protection legislation is already extensive and provides for the balance of rights of data subjects with the rights of others (including the right to freedom of expression and information). It is already highly prescriptive. A code containing further prescriptive rules, contrary to the existing approach, would be counter-productive to the public's right to information.

Specific issues unique to this area:

- The role of editorial discretion and editorial judgement. To ensure effective protection for freedom of expression and information to the public, editorial decision makers must be afforded a margin of discretion in which to make and justify their decisions, which may be made in a time-sensitive environment and without the luxury of hindsight. The role of the ICO must be to review the reasonableness of their subjective decision making (as expressed in the present guidance), having regard to that margin of discretion and the expertise of the editor or journalist, and not to substitute its own view as to how journalism should be practised or apply a purely objective assessment.

- The fundamental principle of "freedom of the press". This should be reflected in any new Code and where there is a balance between regulation or not, the balance should lie in favour of freedom of the media. The media is already heavily regulated by law and industry regulators such as Ofcom or IPSO – often covering issues relating to data protection such as privacy and news gathering procedures. We note that the ICO has recognised that it is not a *"specialist media regulator"* and does not claim to have the expertise to act as such.

- Protection of sources: Information of public importance will not come into the public domain unless whistle blowers / anonymous sources are given protection. Any new code must reflect the importance of protection of sources, and be consistent with the existing law that affords them protection.

- The importance of a pluralistic media and the wide nature of journalism: There is an inherent public interest in a diverse media and in journalism in all its forms. This is explicitly recognised at Schedule 2, Part 5, para.26(4) Data Protection Act 2018, which recognises that *"In*

determining whether publication would be in the public interest the controller must take into account the special importance of the public interest in the freedom of expression and information", that is to say that regardless of the public interest value of the specific personal data or particular output, the public interest in journalism itself is to be weighed in the balance. It should not be assumed that the media are a homogeneous group or that there is a homogenised approach to editorial decision-making. "The media" and "journalism" range from an individual blogger to a multi-national broadcaster; in order to protect freedom of expression in all its forms requires that a flexible approach is applied to ensure that all forms of processing for the purposes of journalism are adequately protected.

This is also reflected in law. For example, The European Court of Justice has held that "*In order to take account of the importance of the right to freedom of expression in every democratic society, it is necessary, first, to interpret notions relating to that freedom, such as journalism, broadly*" in Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy and Satamedia Oy Case C 73/07 (2008).

In addition, attention should be paid to the wide range of third parties who may be involved in the journalistic process. See for example, in *Sergejs Buivids v Datu valsts inspekcija* C–345/17 (2019), the European Court of Justice held that the uploading and dissemination of video recordings of police officers in the exercise of their duties could fall within the definition of journalistic activities, notwithstanding that the individual concerned was not a professional journalist.

- The fast-moving nature of the media: In newsrooms every day decisions have to be made swiftly. News is by its nature dynamic, fluid and can change by the minute. Prescriptive procedures are not compatible with the very nature of news. So that the public are informed contemporaneously, the news process must not be hampered by procedures that cause delay or even mean that events are not reported.

- Data protection law being inappropriately used to stifle public criticism: In HH Prince Moulay Hicham Ben Abdallah Al Alaoui of Morocco v Elaph Publishing Ltd [2017] EWCA Civ 29, while upholding the grant of permission to allow the pleading of a data protection claim in addition to a defamation action in circumstances where there was no issue of limitation, the Court warned that this would require *"careful management so as to ensure that the litigation process is directed to achieving a just result in a proportionate manner, and, emphatically, is not used as a means of stifling criticism under the guise of correcting inaccuracy"*.

  The prospect of complaints and claims being made in an attempt to stifle journalism reinforces the importance of the guidance including curbs to be imposed on such abuses.

The present ICO Guide:

We identify the following features, in particular, as ones which the MLA wish to encourage the ICO to retain:

- Research and contact information: The Guidance confirms that research and background materials are *"a vital journalistic resource"* and can be retained for long periods or indefinitely, even if there is no specific story in mind: see pp.11-12 and guidance on Principles 3 and 5 on

p.25. It is particularly helpful that the Guidance is explicit on this point, given the reference to not *"keep[ing] things you don't need"* in the *"data protection myths"* on p.7.

- Inherent public interest in journalism: it is expressly recognised that there is an inherent public interest in journalism and the maintenance of a free press: see p.34 which confirms that *"there will be a public interest in the full range of media output, from day-to-day stories about local events to celebrity gossip to major public interest investigations"*. The Guidance recognises that the significance of a particular story to the organisation's audience is a relevant factor in considering the public interest (p.34). This is of obvious value to tabloid publications, and we should emphasise its importance, having regard to a tendency to treat the concept of what is in the public interest too narrowly. We would suggest that any data protection guidance should be careful, where appropriate, to ensure its language is consistent with the applicable Code (see p21 of the Guidance).

- Role of the ICO: the Guidance recognises that the ICO is not a specialist media regulator and that it is *"not the ICO's job to usurp that role"* (p.47). It notes that industry codes of practice already address the balance between privacy and freedom of expression and states that *"if you comply with industry codes, this will go a long way to ensure you also comply with the DPA"* (p.21). This reflects para 26(6) of the new exemption in schedule 2 of the DPA 2018, as well as s12 of the HRA 1998, and is important because there is helpful width in several of the Codes.

- Standard of review for reliance on the s.32 exemption: the Guidance repeatedly recognises that the ICO's role is to review the reasonableness of editorial decisions regarding the exemption (i.e. the reasonableness of a belief in (i) the public interest and (ii) incompatibility) and not to substitute its own view (see pp 32, 35 and 48). This is important in maintaining a margin of editorial discretion.

- Relevant decision maker for applying the exemption: the Guidance acknowledges the need for flexibility in terms of who must hold the subjective beliefs for the purposes of the exemption, and how this is to be evidenced. It is acknowledged that in the case of day-to-day stories the judgement of an individual journalist will be sufficient although the Guidance makes clear that more high-profile, intrusive or damaging stories may require senior editorial involvement, and a more formal consideration of the public interest, as well as appropriate policies as to the level at which decisions should be taken (p.35 see also p.13).

- Scope of the exemption: the Guidance also confirms the breadth of the exemption saying it *"can potentially cover any information collected, created or retained as part of a journalist's day-to-day activities"* (p.32) and confirms that the special purposes are to be interpreted broadly such that they are *"likely to cover everything published in a newspaper or magazine, or broadcast on radio or television"* with the exception of advertising (p.29).

- "View to publication": the guidance on p.31 helpfully explains that data need not be being processed with a view to publication of a particular story and that it may be *"retained with a view to it being used in a different story or in updating a story that has already been published"*.

Section 1: Your views on the code

1. **We are considering using our current guidance "Data protection and journalism: a guide for the media" as the basis on which we will build the new journalism code. Do you agree or disagree with this approach?**

Agree. We are supportive of the principles-based approach to the existing guidance, which is consistent with the approach of other regulators. We support the development of a Code which is similarly pragmatic and flexible, as an effective and practical aid to compliance.

2. **If you disagree, please explain why?**

   N/A

3. **"Data protection and journalism: a guide for the media" is split into three sections:**

   "Practical guidance" aimed at anyone working in the journalism sector;

   "Technical guidance" aimed at data protection practitioners within media organisations; and

   "Disputes", aimed at senior editors and staff responsible for data protection compliance.

   Do you think we should retain this structure for the code?

   Yes.

4. **If no, do you have any suggestions about how we should structure the code?**

   N/A

5. **Do you think the ICO's existing guidance for journalists addresses the main areas where data protection issues commonly arise?**

   No.

6. **If no, what additional areas would you like to see covered?**

   We would welcome the inclusion in the guidance of a much fuller recognition of the importance of the fundamental right to freedom of expression and the corresponding rights on the part of the media and the public to impart and receive information.

   We would welcome the inclusion in the guidance of:

   - An improved reflection of the law on the protection of journalistic sources: The existing ICO guidance does not reflect the legal position under s10 Contempt of Court Act 1981. The present Guidance suggests that that there may be cases where it is *'reasonable'* to reveal the identity of a confidential source. *("you only have to disclose information about individuals who are sources (or anyone else identified in the information) if that individual consents, or if it is reasonable to do so".*)

The legal threshold under s10 CCA 1981 for disclosure is "necessity", and only in certain prescribed circumstances; this is a very high threshold to meet. The existing Guidance implies in some cases revealing the identity of sources may be mandatory - which is contrary to modern case-law where the approach of the courts is that it is almost unheard of for a court to order disclosure of a source.

The term *reasonable* should be replaced to protect the importance of source confidentiality and to reflect the law: "necessity" not "reasonableness".

- The protection of archives: Recognition of the explicit protection afforded to archive material, in particular at Recital (153) to the GDPR, which provides that *"The processing of personal data solely for journalistic purposes, or for the purposes of academic, artistic or literary expression should be subject to derogations or exemptions from certain provisions of this Regulation if necessary to reconcile the right to the protection of personal data with the right to freedom of expression and information, as enshrined in Article 11 of the Charter. This should apply in particular to the processing of personal data in the audiovisual field and in news archives and press libraries"*.

  The Code should reflect assurances given by the government at the passing of the Bill on the special nature of media archives. House of Commons Public Bill Committee, *Tuesday 13 March 2018 First Sitting* Data Protection Bill where an amendment to the Bill regarding media archives was withdrawn on the following assurance given:

  "That means that where the exemption applies, data subjects would not have grounds to request that data about them be deleted. It is irrelevant whether the data causes substantial damage or distress".

  Link: https://hansard.parliament.uk/commons/2018-03-13?showNoDebateMessage=True

- Recognition that the exemption can be relied on by third parties who wish to disclose personal data to the 'media', including whistleblowers, public authorities and other organisations, as well as recording the exemption at Schedule 1, para.13 Data Protection Act 2018.

- Recognition that the gathering and retention of research and contact information material is an essential part of journalism even where it is not being held for the purpose of publishing a *specific* story, recognition of the inherent public interest in journalism in all its forms and, the flexible approach to who may be the appropriate decision maker in applying the journalism exemption.

7. **The journalism code will address changes in data protection law, including developments in relevant case law. Are there any particular changes to data protection law that you think we should focus on in the code?**

- The removal of the requirement from Article 85 GDPR and Schedule 2, Part 5, para.26(2)(a) Data Protection Act 2018 that processing must be *"only"* for the special purposes in order to fall within the scope of the journalism exemption.

- Recognition of the expanded breadth of the journalism exemption, in relation to international data transfers (Schedule 2, Part 5, para.26(9)(d) Data Protection Act 2018) and the co-operation and consistency mechanism (Schedule 2, Part 5, para.26(9)(e) Data Protection Act 2018), for example.

- Recognition of the new defences afforded to the new offences (offences of knowingly or reckless obtaining personal data and re-identifying de-identified personal data) in the Data Protection Act 2018 (i.e. s170(3) Data Protection Act 2018 and s171(4)(c) Data Protection Act 2018) for those processing for the special purposes. The defences are applicable where the data controller (i.e. the media organisation, independent production company, freelancer etc) was acting for the special purposes, with a view to the publication of journalistic material and with a reasonable belief that their conduct was justified as being in the public interest. (This is a change to the position previously where media organisations would have had to hope that the prosecutor would exercise their discretion in favour of not prosecuting the offence where it was carried out for the purposes of public interest journalism in accordance with the CPS' 'Guidance for prosecutors on assessing the public interest in cases affecting the media').

- The fact that so-called 'campaigning journalism' can still legitimately fall within the scope of the exemption ought to be reflected, in accordance with the ICO's approach in the Steinmetz v Global Witness (2014) case.

- The acceptance in the recent case of NT1 and NT2 v Google LLC [2018] EWHC 799 that an individual who *"deliberately conducts himself in a criminal fashion"* will be deemed to have manifestly made public his personal data in connection with that alleged or actual criminality, ought to be reflected.

- The application of principles derived from the domestic law of defamation to data protection complaints of inaccuracy, in particular principles as to: (i) the importance of context in assessing the accuracy of personal data complained of; (ii) the protection of statements of opinion or evaluation; (iii) the need for remedial discretion (which applies equally to the courts and the ICO); and, (iv) the latitude given by domestic law to those reporting the courts and/or parliament (see NT1 and NT2 at [80]-[87]).

8. Apart from recent changes to data protection law, are there any other developments that are having an impact on journalism that you think we should address in the code?

Models of journalism are changing, both as a result of format convergence and economic pressures on the industry. One consequence of this has been the development – in some parts of the industry – of editorial structures which are

flatter or less hierarchical than would traditionally been the case, and the ICO must ensure that the Guidance is sufficiently flexible to allow such models of editorial decision making and avoid stifling innovation.

Processing for the purposes of journalism will not solely be carried out by media organisations; the concept of 'journalism' is required to be interpreted broadly to ensure proper protection for the special purposes and may be carried out by citizen journalists, bloggers, charitable organisations, and whistle-blowers, as well as public authorities and other organisations who wish to disclose personal data to the media. While we refer to the 'media' throughout this response, this should not be taken as an indication that the right does not extend more widely.

As such, prescriptive 'one size fits all' requirements for evidencing or recording reliance on the special purposes exemption are unlikely to be appropriate.

9. Are there any case studies or journalism scenarios that you would like to see included in the journalism code?

We remain supportive of the principles-based approach adopted in the guidance, and are reluctant to introduce specific case-studies or scenarios which will inevitably need to be over-simplified and will therefore have limited utility and/or have a chilling effect on public interest journalism.

10. Do you have any other suggestions for the journalism code?

- **Avoid prescriptive procedures concerning recording**: The existing guidance states that *"Organisations will find it easier to rely on the exemption if they can show... appropriate record keeping for particularly controversial decisions"*. This is of significant concern and should be reviewed/ deleted to avoid the suggestion that a failure to keep contemporaneous records of editorial decision making in the form of a specific document would prevent a media organisation from relying on the journalism exemption. We do not consider that the code should be prescriptive as to the specific recording of editorial decision making. Each case is likely to be fact-specific and depend on the relevant circumstances in any event.

  We anticipate that in many cases, decision making by reference to internal policies or applicable editorial codes should be sufficient.

  Contemporaneous recording of decision making, even in serious cases, ought not to be mandatory, given the practical reality of making editorial judgements in real time and at speed, which is inherent in publishing news.

  Clearly, if a media organisation is unable to evidence its editorial decision making by any means then that may be a relevant factor in its ability to rely on the journalism exemption. Contemporaneous documentation may be considered but the relevance of a witness statement must not be disregarded. Throughout the legislation the issue of *"compatibility"* with journalism is fundamental. It should be noted that prescriptive document making is not compatible with news journalism and is not required by other regulators, including statutory media

regulators such as Ofcom. Documenting every decision is neither necessary nor proportionate and is an inappropriate restriction on the right to freedom of expression and information.

The present guidance states that the media must *"balance the detrimental effect compliance would have on journalism against the detrimental effect non-compliance would have on the rights of the data subject"*. This substantially complicates what should be a straightforward provision, which does not obviously contain a proportionality requirement, and which is different to the approach adopted by the Court of Appeal's judgment on the data protection issues in *Campbell.* We would also suggest that the guidance should be explicit that the subjective belief – at least in day to day cases – can be established by reference to an organisation's editorial policies.

- **Notification:** In the context of considering whether data subjects should be notified that their personal data is being processed, and if so at what point in time, the existing guidance states that data controllers *"will need a valid reason"* for not notifying the subject of a journalistic investigation that their data is being collected and that this *"justification should reflect the privacy intrusion"*. This appears to suggest that in circumstances where information which is capable of attracting a strong privacy interest is proposed to be published, notification is more likely to be required; not only does this fail to accord with the requirements of the journalism exemption but this approach has been specifically rejected by the European Court of Human Rights in Mosley v United Kingdom (48009/08), [2012] EMLR 1.

- **Sources:** The approach to the protection of confidential sources as set out in the existing guidance fails to properly reflect the existing law in that it suggests that there may be (unspecified) circumstances in which it would be reasonable, and therefore mandatory, for a media organisation to reveal the identity of a confidential source in response to a right of access request, for example. Article 10 of the European Convention on Human Rights and s10 Contempt of Court Act 1981 require that only where a court is satisfied that disclosure is necessary for certain specified purposes, specifically in the interests of justice or national security or for the prevention of disorder or crime, can a journalist be required to identify a journalistic source.

- **Disclosure of information to journalists:** At present, the guidance on the exemption does not explain that it can be relied on by third parties who wish to make disclosures of personal data to journalists in the public interest. This could helpfully be addressed, given the increasing uninformed reliance on data protection as a justification for refusing disclosure of information to journalists.

- **Definition of journalistic purpose:** The scope of what constitutes a journalistic purpose seems inappropriately narrow in the existing guidance, which provides that, for example, *"the exemption cannot apply to anything that is not an integral part of the newsgathering and editorial process. For example, information created in response to a complaint about a particular story after publication is unlikely to be processed with a view to publication"*.

This contradicts the Supreme Court's acceptance in the case of Sugar (Deceased) v BBC [2012] UKSC 4 that the purpose of journalism encapsulates the act of publishing or broadcasting together with *"first, the collecting, writing and verifying of material for publication; second, the editing of the material, including its selection and arrangement, the provision of context for it and the determination of when and how it should be broadcast; and third, the maintenance and enhancement of the standards of the output by reviews of its quality, in terms in particular of accuracy, balance and completeness, and the supervision and training of journalists"* (para.39). This in fact suggests that complaints material, which will in any event be relevant to the ongoing or further publication of journalistic material and the assessment of whether publication remains in the public interest, does fall within the scope of the exemption and should be recognised as such.

- **Tests to be applied:** The guidance at present conflates certain of the requirements of the journalism exemption, by introducing a proportionality test (which is properly found only in the requirement for a reasonable belief that publication would be in the public interest). These overstate the requirements for reliance upon the exemption and ought not to be included in the code.

  For example, in the context of covert investigations it is stated that *"If you do need to use undercover or intrusive covert methods to get a story, such as surveillance, you may do so if you reasonably believe that these methods are necessary (in other words it is not reasonably possible to use a less intrusive way to obtain the information) and the story is in the public interest. To establish whether covert investigation is justified in the public interest, you must balance the detrimental effect that informing the data subject would have on the journalistic assignment against the detrimental effect employing covert methods would have on the privacy of any data subjects. The importance of the story, the extent to which the information can be verified, the level of intrusion and the potential impact upon the data subject and third parties are all relevant factors"*.

  Other examples are that it is stated that *"there must be a clear argument that the provision in question presents an obstacle to responsible journalism"*, that it must be *"impossible to both comply with a particular provision and to fulfil your journalistic purpose"*, and that the media must *"balance the detrimental effect compliance would have on journalism against the detrimental effect non-compliance would have on the rights of the data subject"*. This substantially complicates what should be a straightforward provision, which does not obviously contain a proportionality requirement, and which is different to the approach adopted by the Court of Appeal's judgment on the data protection issues in Campbell. We would also suggest that the guidance should be explicit that the subjective belief – at least in day to day cases – can be established by reference to an organisation's editorial policies.

- **Respecting editorial decision-making:** The guidance states that *"even if a story is clearly in the public interest, if a journalist can reasonably research and present it in a way that complies with the standard provisions of the DPA, they must"*.

This approach suggests that the ICO will step into the editorial judgement making process and decide whether alternate output could be produced, albeit that it is not in accordance with the data controller's editorial objective.

The Code should make clear that, provided that a data controller reasonably believes there to be an editorial justification for a proposed approach, the journalism exemption will be open to that data controller.

To do otherwise would have the effect of severely inhibiting editorial discretion and is contrary to jurisprudence, which emphasises that it is not the role of public authorities to usurp the role of the editor.

Article 10 of the European Convention on Human Rights protects not only the substance of the information and ideas conveyed by the news and current affairs media, but also the form in which they are expressed. See Jersild v Denmark (1995) 19 EHRR 1, at [31] and Application by Guardian News and Media Limited and others in Her Majesty's Treasury v Mohammed Jabar Ahmed and others (FC) [2010] UKSC 1, [63].

- **Allegations or suspicions of wrongdoing**: At various points, the guidance focuses only on actual wrongdoing or incompetence, or criminality, (for example *"if it is related to wrongdoing or incompetence"*) but omits reference to "allegations" / "claims" / "suspicions" of such conduct being capable of being the subject of a reasonable belief in public interest. This appears to be an unintended omission and would benefit from explicit inclusion.

  The present guidance does not deal with the basis on which journalists may lawfully process data as part of an investigation into *suspected* wrongdoing, and does not acknowledge that this is itself a matter of public and/or legitimate interest. Examples include the fourth bullet point on p.9 which states *"only collect information about someone's health, sex life or criminal behaviour if you are confident it is relevant"*, when at the early stages of an investigation it may be justified for a journalist to process such data on the basis that it may be (or become) relevant to a matter of public interest, depending on the outcome of that investigation. There are several passages which, read literally, suggest there has to be actual wrongdoing (eg the top of p11). This does not reflect that an investigation is an evolving process and may relate to claims not proven fact.

Section 2: About you

11. Are you?

A trade association.

12. How did you find out about this survey?

ICO website

We may want to contact you about some of the points you have raised. If you are happy for us to do this please provide your email address: